No. 127

In the Supreme Court of the United States

OCTOBER TERM, 1957

LOCAL 1976, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A.F.L.; LOS ANGELES COUNTY DISTRICT COUNCIL OF CARPENTERS; NATHAN FLEISHER, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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CITATIONS

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OPINIONS BELOW

The opinion of the court below (R. 208–223) is reported at 241 F. 2d 147. The findings of fact, conclusions of law, and order of the Board (R. 48–81) are reported at 113 NLRB 1210.

JURISDICTION

The judgment of the court below (R. 223–226) was entered on March 20, 1957. The writ of certiorari was granted on October 14, 1957 (R. 227). The jurisdiction of this Court rests on 28 U. S. C. 1254 and

Section 10 (e) of the National Labor Relations Act, as amended, 61 Stat. 147, 29 U. S. C. 160 (e).

STATUTE INVOLVED

The principal provision involved is Section 8 (b) (4) (A) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), which reads as follows:[1]

> SEC. 8 (b). It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * *
>
> (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *

QUESTION PRESENTED.

Whether union inducement of employee refusals to work on nonunion goods, which would otherwise be proscribed as a secondary boycott by Section 8 (b)

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[1] Other relevant provisions of the Act are set forth in Appendix A to the Board's brief in the companion cases, Nos. 273 and 324, which present the same issue as that involved here.

(4) (A) of the National Labor Relations Act, as amended, is lawful because the employer and the union here agreed by contract that the employees "shall not be required to work on nonunion materials."[2]

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

The unfair labor practices found by the Board arose out of petitioners' inducement of employees of Havstad and Jensen to refuse to handle doors at the construction site of the White Memorial Hospital, in Los Angeles, California. Havstad and Jensen were engaged by the College of Medical Evangelists, a religious organization, as the general contractor for the construction of the hospital and other buildings on the college campus (R. 17; 124–125, 187–188). The doors in question were manufactured by Paine Lumber Company of Oshkosh, Wisconsin, and were obtained by Havstad and Jensen from Watson and Dreps, millwork contractors in Los Angeles. Watson and Dreps, in turn, had purchased the doors from Sand Door and Plywood Company, which is engaged in the wholesale jobbing of plywood doors and allied building materials in the Los Angeles area and is the exclusive Southern California distributor for Paine (R. 16–17; 169–171, 173–174, 184–185).

In 1953, the value of shipments of materials, including doors, from Paine in Wisconsin to Sand Door

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[2] This corresponds to the third question set forth in petitioners' brief. The first two questions set forth there (Br. 2) were not presented in the petition for certiorari (see Pet. 2) and are not properly before the Court. *Irvine* v. *California*, 347 U. S. 128, 129–130; *Mazer* v. *Stein*, 347 U. S. 201, 208, n. 6.

in California, amounted to $185,796.84, and from January 1, 1954, through September 8, 1954, such shipments amounted to $103,503.05 (R. 17; 172–173). The doors here involved have a value of $9,148.32. They were received by Sand Door from Paine early in August 1954, whereupon Sand Door notified Watson and Dreps, who picked them up and delivered them to the construction site by August 17 (R. 18; 173–175, 185, 198).

On August 17, 1954, the Paine doors having been delivered to the construction site, Haystad and Jensen's carpenter foreman, Steinert, in accordance with instructions from Superintendent Nicholson, assigned laborers to distribute the doors from floor to floor, and directed carpenter Sam Agronovich to start hanging the doors (R. 18; 110–112, 163–165). Later that morning, Nathan Fleisher, business agent of petitioner Local 1976, came to the building site and told Steinert that the men would have to stop hanging the doors, which did not have a United Brotherhood of Carpenters' label, until it was determined whether or not they were union doors (R. 18, 52–53; 165–166).

Steinert, as was required of carpenter foremen under petitioner District Council's By-Laws and Trade Rules, was a member of a constituent local of the District Council, petitioner Local 1976 (R. 53; 199, 162–163). As a foreman member of the Union, he had the responsibility for enforcing the District Council's By-Laws and Trade Rules, including the rule barring union members from handling nonunion materials (R. 53; 199). Accordingly, upon receiving orders from Fleisher, Steinert immediately stopped

the employees from distributing the doors to the different floors (R. 53; 165). Then, accompanied by Fleisher, Steinert went to carpenter Sam Agronovich and told him to discontinue hanging the doors because they were not union made (R. 18, 53; 165–166).

About 11 a.m., James Nicholson, general superintendent of construction for Havstad and Jensen, arrived at the job site and learned that the doors were not being hung (R. 18–19; 106, 113–116). Nicholson walked up to Business Agent Fleisher, who was talking with Steinert and carpenter Finkelstein, and asked why he had stopped work on the doors (R. 19, 54; 116–118). Fleisher replied that he had "orders from the District Council that morning to stop them from hanging the doors" and that he "could have pulled them off yesterday but * * * waited until today" (R. 54; 117). At this point, carpenters Sam Agronovich and Saul Agronovich (who was also union steward) approached. Superintendent Nicholson told them that they might as well pick up their tools, but upon reconsideration told Steinert to assign them to other work (R. 19; 117–119).

On that day and the next, James Barron, vice president and general manager of Sand Door, had telephone conversations with Earl Thomas, a representative of petitioner District Council, who advised him that the Council had checked with a Carpenters' local in Wisconsin and found that the doors were not union made (R. 19; 175–180). Barron pointed out that Sand Door, Watson and Dreps, and Havstad and Jensen all hired union men and were therefore innocent bystanders, but Thomas insisted that they could

net permit the hanging of the nonunion doors and suggested that Sand Door had better cancel its orders with Paine and buy union doors (R. 19; 178–179). Barron also talked to Business Agent Fleisher, who told him that the doors did not have a union label and that they would have to be "cleared" before they could be hung (R. 19; 181–184). Emmett Jensen of Haystad and Jensen also talked to District Council Representative Thomas, who told him that, since it had been ascertained that the doors were nonunion, the carpenters would not be able to hang them (R. 19; 190–191).

Thereafter, on October 5, Superintendent Nicholson and Steinert asked each carpenter employee on the hospital job if he would be willing to hang the doors (R. 20; 120–121, 138–150, 166–167). Each of the carpenters replied, in substance, that he would not unless clearance was obtained from the Union (*ibid.*).

At the time of the foregoing events, there was in effect a labor agreement negotiated between petitioners' parent, United Brotherhood of Carpenters, and the Building Contractors' Association of Southern California, of which Haystad and Jensen were members. This agreement provided, *inter alia*, that "Workmen shall not be required to handle non-union material" (R. 17–23, 57; 203).

B. THE BOARD'S CONCLUSIONS AND ORDER

Upon the foregoing facts, the Board, with two members dissenting, held that petitioners, in violation of Section 8 (b) (4) (A) of the Act, had induced the employees of Haystad and Jensen to engage in a con-

certed refusal to install nonunion doors manufactured by Paine, with the objects of forcing Haystad and Jensen to cease using or handling Paine products and of forcing Saind Door to cease doing business with Paine (R. 48–80). In arriving at this conclusion, the Board rejected petitioners' contention that the inducement of these employees was privileged because of the provision, noted above, in the contract between the builders and the Union.

Two members of the Board majority were of the view that, irrespective "of the existence of a 'hot cargo' clause, any direct appeal to employees by a union to engage in a strike or concerted refusal to handle a product is proscribed by the Act when one of the objectives set forth in Section 8 (b) (4) (A) is present" (R. 62). The third member of the Board majority stated that the "hot cargo" clause could not serve as a defense to a violation of Section 8 (b) (4) (A) because such provision was contrary to the policy of the Act and thus void (R. 66–68).

The Board's order (R. 64–66) requires Local 1976 and the District Council and their agents, including petitioner Fleisher, to cease and desist from the unfair labor practices found and to post appropriate notices.

C. THE DECISION OF THE COURT BELOW

The court below enforced the Board's order (R. 207–223). Respecting petitioners' "hot cargo" clause defense, the court stated (R. 217):

> In our view, there was inducement to a concerted refusal in the statutory sense, not an-

> thorized by the contract between Havstad and Jensen and the Union. An employee may well remain free to decide, as a matter of business policy, whether he will accede to a union's boycott demands, or, if he has already agreed to do so, whether he will fulfill his agreement. An entirely different situation, however, is presented under § 8 (b) (4) (A) of the Act * * * when it is sought to influence the employer's decision by a work stoppage of his employees. Such a work stoppage, Congress has plainly declared, is unlawful, when an object—clearly present here—"is * * * forcing or requiring any employer * * * to cease using * * * the products of any other * * * manufacturer, or to cease doing business with any other person."

ARGUMENT

The question presented in this case is the same as that presented in the companion case, *National Labor Relations Board* v. *General Drivers, etc.*, No. 273, namely, whether union inducement of employees not to work on disfavored products, which would otherwise be proscribed by Section 8(b) (4) (A) of the Act, is lawful because the employer has, by a "hot cargo" clause in his contract with the union, consented in advance to the employees not handling such products.[1] It is the Board's position that the court

[1] However in No. 273, unlike here, the employer-parties to the "hot cargo" agreement were motor carriers subject to the Interstate Commerce Act. As indicated in the Board's brief in No. 273 (pp. 55–56), there are additional grounds for concluding that a "hot cargo" agreement is no defense where such carriers are involved. See, also, *Galveston Truck Line Corp.* v. *Ada Motor Lines, Inc.*, No. MC–C–1922, Interstate Commerce Commission, December 16, 1957.

below correctly answered this question in the negative, and we respectfully refer the Court to the Board's brief in No. 273 for a full statement of the supporting reasons.

Petitioners here make one contention which we have not previously treated. They contend (Br. 26–30) that a contract clause providing that employees shall not be required to work on nonunion goods is no different from a clause providing that the employees shall not be required to work under "unsafe conditions" or for less than a certain wage, *i. e.*, it describes the terms under which the employees shall be required to work for their employer. When the employer fails to abide by these terms, petitioners assert, the employees have a direct dispute with him, and thus any resultant work stoppage is "primary" activity outside the purview of Section 8 (b) (4) (A).

This contention is similar to the contention which the Court rejected in *National Labor Relations Board* v. *Denver Building and Construction Trades Council*, 341 U. S. 675. There, the union sought to justify the strike called against Doose and Lintner, a general contractor who had engaged a non-union subcontractor, on the ground that it had a primary dispute with Doose and Lintner for bringing a non-union subcontractor on to the project. The Court held that it is sufficient for purposes of Section 8 (b) (4) (A) if a cessation of business relations be *an* object, though not the sole object, of the union's conduct. It further concluded that, since the union's objective of making the job all-union could only be attained by getting Doose and

Lintner to break its contract with the subcontractor, the strike "must have included among its objects that of forcing Doose & Lintner to terminate that subcontract" (341 U. S. at 688). The Court therefore accepted the Board's finding that the strike was for an object proscribed by Section 8 (b) (4) (A).

So here, the Board has found that *an* object of enforcing the "hot goods" clause was to force Havstad and Jensen, the employer party to the agreement, and also Sam Door, the intermediate distributor who was not a party, to cease using or dealing in the products of Paine Lumber (R. 55–56, 64). This finding of secondary object is not open to question now (n. 2, p. 3, *supra*). Accordingly, it is immaterial that petitioners may also have had the object of inducing Havstad and Jensen to comply with contract terms. For, even if this object were assumed to be lawful, it does not eliminate the finding that there was an additional object, one violative of Section 8 (b) (4) (A).

Furthermore, it should be noted that a "hot cargo" clause cannot fairly be equated, as petitioners do (Br. 26–27), with contract provisions respecting safety conditions or rates of pay. The latter provisions may reasonably be viewed as pertaining to relations between the contracting employer and his employees, and any dispute relating to them as being of a "primary" nature. They cover matters which have an immediate and direct bearing on the employees' welfare, and over which their employer has effective control. The "hot cargo" clause, on the other hand, involves a commitment not to use a certain product, not because of any dispute over the product with the contracting em-

ployer; but because the union disfavors the labor conditions under which the product was manufactured by some other employer. The contracting employer is powerless to grant the union's ultimate demands, *e. g.*, unionization of the manufacturer's employees, and can aid its cause only by the indirect means of ceasing to use or handle the product. Indirect pressure of this kind is precisely what Section 8 (b) (4) (A) was intended to avoid. See Board Brief in No. 273, pp. 22–26. In short, a "hot cargo" clause, by its very nature, is focused upon the type of secondary object proscribed by Section 8 (b) (4) (A).[4]

[4] Indeed, petitioners appear to recognize that a "hot cargo" agreement is aimed at the producer of the disfavored product rather than at the contracting employer. They assert (Br. 29) that, "when an employer or person seeks to inject their products into a market which has contractually been foreclosed to them, they cease to be neutral employers or persons and become not only directly involved, *but are the prime motivation of the industrial dispute*" [emphasis added].

CONCLUSION

For the reasons stated above and in the Board's brief in No. 273, the judgment below should be affirmed.

Respectfully submitted,

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